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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1974

NO. 74-5954

JOHN WESLEY HOOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Each of the three men, who raped Mrs. Lucille Frances Jones in Cook County, Georgia, on July 13, 1973, has been sentenced to death. Eddie Dean Anderson and John Wallace Eberheart were convicted and sentenced by juries. Anderson's appeal was remanded for procedural reasons, and he has been granted a new trial for re-sentencing only. Anderson v. State, No. 28780 (Ga.S.Ct., April 8, 1974), remanding No. 9854 (Cook County, Ga. Superior Court, October Term, 1973). Eberheart's conviction was affirmed in 232 Ga. 247, 206 S.E.2d 12 (1974), and he has applied for a writ of certiorari. Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

After the trials of his co-defendants, petitioner pleaded guilty, and he also received the death sentence. The Georgia Supreme Court affirmed, 233 Ga. 149, _____ S.E.2d _____ (1974),

and this petition for a writ of certiorari has followed.

The rape was brutal and barbaric, and its character was determined by petitioner's example. He was the one who initially struck Mrs. Jones after he and his companions came to the secluded spot where her tire had blown out. (T. 5-7). (Petitioner's Exhibit B). He choked her and threatened her life when she fought back inside the car as they abducted her. (T. 7). At the rape scene, when Mrs. Jones could not get out because of the beating, petitioner dragged her by the hair across an asphalt road so roughly that her pants shredded and her leg was burned. (T. 8).

It was petitioner, who ripped Mrs. Jones' clothing off and first raped her. (T. 8-9). When he lost his erection, he crawled up on her neck and forced her to revive it orally. (T. 9). After raping her again, he let his co-defendants, Eberheart and Anderson, follow his example. (T. 9-10).

The three men abandoned Mrs. Jones in the woods. The rape had occurred during her menstrual cycle. She suffered a dislocated jaw, numerous oral and dental injuries, a broken nose, internal stomach injuries, a burned thigh, lacerations and bruises. She had been raped in a bed of red ants called "cowboy" ants and suffered bites all about her shoulders and back. (T. 10-11, 18-19).

Petitioner's responsibility for the crime is admitted by his plea of guilty, whose voluntary and knowing nature is shown affirmatively on the record and has not been questioned at any stage of review. Instead, in seeking a writ of certiorari from this Court, petitioner advances the arguments for death sentence review already presented by his co-defendant Eberheart in his petition, and, in addition, petitioner Hooks contends he was denied Due Process, under his reading of the

Georgia death statute, by the State's omission of a notice of aggravating circumstances, which it intended to prove.

REASONS FOR NOT GRANTING THE WRIT

I. THE SENTENCE OF DEATH DID NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT. (Question 1).

In Exhibit C, petitioner incorporates reasons for granting Eighth Amendment review presented by his co-defendant, Eberheart, in no. 74-5174 (filed August 19, 1974). Brief for Petitioner, 17. Respondent also continues to rely upon his brief in opposition in that case and further supplements his opposition to the grant of certiorari as follows.

On the merits, the Eighth Amendment argument is three-fold: Any death sentence is cruel and unusual by contemporary standards; if not, any death sentence for rape is so excessive it is cruel and unusual; finally, if death may be imposed, its imposition here occurred under the procedures which permit "its arbitrary, rare and discriminatory use," contrary to the teaching of Furman v. Georgia, 408 U.S. 238 (1972). Brief for Petitioner, App. 1c ff, 29c, 30c.

The threshold reason proffered for granting review of these contentions by writ of certiorari is itself an implicit inroad into the argument on the merits. Although contending that contemporary community standards render capital punishment cruel and unusual, petitioner acknowledges in urging review that Georgia is not alone in continuing to authorize death sentences after Furman. Brief for Petitioner, 17-18; 28c.

Indeed, most American jurisdictions have done so. Note, 87 Harv. L. Rev. 1690, 1691 (1974). Therefore, it is common starting ground for petitioner and respondent that since Furman a number of persons have been found by their contemporaries to merit death as lawful punishment.

It is also common starting ground that there have been two general approaches to compliance with Furman by the majority group of American jurisdictions, just described, who currently authorize capital punishment: On the one hand are statutes which make death mandatory when authorized, and on the other hand are statutes which allow controlled discretion. Brief for Petitioner, 28c; see also Note, 87 Harv. L. Rev. 1690, 1691-1692, 1699 (1974)(identifying four basic approaches along a line with mandatory and discretionary end points). Respondent also agrees with petitioner that Georgia is among those jurisdictions which authorize discretion.

The point of departure is in petitioner's claim to have demonstrated compelling grounds for granting review. As just demonstrated, the claim itself acknowledges a post-Furman reaffirmation of capital punishment. The claim also mischaracterizes the particular means of reaffirmation in Georgia: As written and construed, the Georgia procedures are not arbitrary and discriminatory, and the petition does not create substantial doubt that they are within what should be the ultimate distillation of the teaching in Furman.

Furman does not hold that the death sentence is per se unconstitutional. Nor does Furman hold that a particular statutory vehicle must be the means by which death is imposed. Instead, Furman is result-oriented. The opinions examine not statutes but what had happened in their implementation.

Respondent respectfully suggests that the holding in Furman may be stated as the following, constitutionally required result under any capital procedure: Isolated defendants cannot be sentenced to die on the basis of chance or arbitrariness or impermissible social attitudes. The statute must be applied in such a way that there is a meaningful pattern of death sentence imposition.

As written and construed, Georgia procedures satisfy this criterion. Under the 1973 statute, once guilt is determined on a capital charge, there are ten "statutory aggravating circumstances," one of which, at least, must be present beyond reasonable doubt before death can be imposed. Ga. Laws 1973, p. 159, 162, 164-166, 170-171, amended, in part, without material change, Ga. Laws 1974, pp. 352, 355-358 [Ga. Code Ann. §§ 26-3102, 27-2503 (formerly-2534.1), - 2534, - 2537 (Supp. 1974)]. The statutory aggravating circumstance is a procedural prerequisite to death sentence imposition: Its presence beyond reasonable doubt does not mandate a death sentence.

If death is imposed, there is a second level set of guidelines by which the Supreme Court of Georgia reviews the sentence. Ga. Code Ann. § 27-2537, supra. These standards have been paraphrased by the Georgia Supreme Court as follows:

> "Whether the sentences of death were imposed under the influence of passion, prejudice or any other arbitrary factor;[1]

---

[1] The scope of this guideline is illustrated by Prevatte v. State, No. 29419 (Ga. S.Ct. Feb. 25, 1975), which reverses on a ground of improper prosecutorial argument which had not been the subject of a trial-level issue and would not have been preserved for review in a conventional case. Respondent's Exhibit A. See also Respondent's Exhibit B, Stack v. State, No. 29324 (Ga. S.Ct., Mar. 18, 1975).

> whether the evidence supports the jury's finding of a statutory aggravating circumstance; and whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant...." Floyd v. State, 233 Ga. 280, 284,_____ S.E. 2d _____(1974).

Like the statutory aggravating circumstance at the trial level, these standards of review place procedural barriers in the way of imposition of death, not the nonimposition. The precise issue, then, which petitioner would place before the Court is whether the Eighth Amendment forbids the Georgia statute, whose discretionary guidelines control the imposition of death with clear and objective standards but at no point require a death sentence. In terms of the suggested holding of Furman, the question for consideration of the application for certiorari is whether the petition raises the question that the statute has resulted, and will result, in a non-meaningful pattern of death sentence imposition, one due to chance, arbitrariness and impermissible social practice.

Primarily, but not alone, through its review for disproportionate sentences, the Georgia Supreme Court has seen to the implementation of the Georgia statute in the required, neutral and meaningful pattern. The Court has construed its "duty

> under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally

and not 'wantonly and freakishly imposed...." Moore v. State, No. 29278 (Ga. S.Ct., Feb. 12, 1975)(p. 6-7). (Emphasis added). Respondent's Exhibit C.

Review for disproportionality has resulted, for all practical purposes, in elimination of the death sentence for armed robbery. Floyd v. State, 233 Ga. 280, S.E. 2d (1974); Gregg v. State, 233 Ga. 117, S.E. 2d (1974). Rape and probably kidnapping will require particularly pathetic circumstances. Compare Coley v. State, 231 Ga. 829, 204 S.E. 2d 612 (1973) with Eberheart v. State, 232 Ga. 247, 206 S.E. 2d 12 (1974). The classic death sentence will be one for senseless murder. See e.g., Gregg, supra; House v. State, 232 Ga. 140, 205 S.E. 2d 217 (1974).

By its own terms, the Georgia procedure is self-contracting -- but not arbitrarily so. All members of the death sentence groups of whatever size will be perpetrators of crimes, whose circumstances generally brought death for those to blame. This approach construes the pre-Furman problem not to have been that isolated members of the group deserving of death escaped it but instead to have been that isolated members of the group did not escape it.

Assuming arguendo his membership in the group is not arbitrarily determined, petitioner nevertheless urges that contemporary community mores so patently reject capital punishment, at least for rape, that the Court should entertain his plea that it is prohibited by the Eighth Amendment as cruel and unusual, on that ground. But his membership is in a group determined by the Georgia Supreme Court to be one whose members will generally be found by petitioner's contemporaries to be deserving of death.

Petitioner cites other jurisdictions for the non-authorization of capital punishment for rape and kidnapping. Petitioner would not be under sentence of death had he merely raped Mrs. Jones. Other jurisdictions aside, he has not demonstrated reason to believe that he can show that current American attitudes cause the Eighth Amendment to prevent deterring a man with death should he ever contemplate beating a stranded woman, dragging her across a road by the hair, and straddling her neck for the oral stimulation he needs to rape her once again in a bed of ants.

II. PETITIONER DID NOT MAKE A SEASONABLE PRESENTATION OF HIS CONTENTION THAT THE GEORGIA PROCEDURE FOR DETERMINING DEATH SENTENCE PROPORTIONALITY DENIES HIM DUE PROCESS, EQUAL PROTECTION UNDER THE LAW, AND THE EFFECTIVE ASSISTANCE OF COUNSEL. (Question 2).

As did petitioner in Eberheart, petitioner here attacks the procedure by which the Georgia Supreme Court reviews death sentences to determine whether they are disproportionate or excessive, considering both the crime and the defendant. This attack is in a sense apart from the alleged role of the review mechanism in preserving the arbitrary and discriminatory imposition of capital punishment. Proceeding under the Due Process and Equal Protection clauses, and the right to effective assistance of counsel, petitioner argues that only men of means can study other cases to argue their sentence is disproportionate and that for all defendants, it is unclear which cases the Georgia Supreme Court considers and under which standards of comparison.

This is a federal question raised for the first time in the Georgia Supreme Court by way only of motion for rehearing. This was an untimely presentation and ineffective in preserving the issue for review by writ of certiorari. See Bohannan v. Arizona, 389 U.S. 1 (1967); Herndon v. Georgia, 295 U.S. 441 (1935); Jett Bros. Distillation Co. v. Carrollton, 252 U.S. 1 (1920).

The gravamen of petitioner's contention here is that the answers to questions he has about the appellate mechanism "are all unknown and unknowable." Petitioner's Exhibit 32c. On the present record of petitioner, the answers to such questions may be speculative. But that is not to say that the answers to such questions cannot be developed upon a proper record, see Ross v. State, 233 Ga. 361, 364-367, _____ S.E.2d _____ (1974), and since the answers can be ascertained with certainty, there is no reason to decide this issue on the basis of speculation.

III. PETITIONER MISCONSTRUES THE GEORGIA DEATH STATUTE IN CONTENDING THAT HE WAS DEPRIVED OF A REQUIRED NOTICE OF AGGRAVATING CIRCUMSTANCES AND THE RECORD DOES NOT SUPPORT HIS CONTENTION THAT FORMAL LACK OF NOTICE WAS A DENIAL OF DUE PROCESS. (Question 3).

Georgia law requires that the finder of fact in a capital case determine beyond reasonable doubt that certain, "statutory" aggravating circumstances are present before the sentence of death may be imposed. Ga. Code Ann. §§ 26-3102, 27-2528, -2534 (now 27-2503), 27-2534.1. Georgia law also provides that the State may introduce "evidence in aggravation" for the purpose of determining the sentence in a criminal trial just as a defendant may also introduce evidence in mitigation. Ga. Code Ann.

§ 27-2534 (now § 27-2503). Petitioner's construction of Georgia law equates "statutory aggravating circumstances" with "evidence in aggravation" and that construction is contrary to the interpretation of the Georgia Supreme Court. Moreover, petitioner's construction is not so obviously correct that he can contend that he was entitled as a matter of due process to rely upon it. Nor has he established a record to support his contention of prejudice.

Under the Georgia procedures for capital punishment, petitioner's guilty plea occurred in the following context:

> "Any person who has been indicted for an offense punishable by death may enter a plea of guilty . . . and the judge . . . may, in his discretion . . . sentence such person . . . to any punishment authorized by law. . . . Provided, however, that the judge of the Superior Court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty. . . ." Ga. Laws 1973, pp. 159, 171 [Ga. Code Ann. § 27-2528 (Supp. 1974)].

The aggravating circumstances are listed in Code section 27-2534.1, which itself also contains a requirement that a finding of an aggravating circumstance precede an imposition of death. Ga. Laws 1973, pp. 159, 164, 165.

A similar requirement is in effect for bench trials and jury trials. Ga. Laws 1973, pp. 159, 162, 170, as amended, without substantial change, Ga. Laws 1974, 352, 356, 357 [Ga.

Code Ann. §§ 26-3102, 27-2534, now 27-2503.] Section 27-2534 preceded the death sentence procedures and in fact is the matrix for the bifurcated trial in Georgia.

In describing the punishment phase of the trial, the bifurcated trial provisions indicate the following:

> "In such hearing (punishment phase), subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." Ga. Laws 1973, pp. 159, 162 [formerly Ga. Code Ann. § 27-2534].

As amended by the death statute, this provision does go on to provide that:

> "In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed." Id.

Prior to petitioner's appeal, the Georgia Supreme Court, in jury trial cases, had considered the question whether notice of

statutory aggravating circumstances was a prerequisite to imposition of a death sentence. On the rationale that the purpose of a bifurcated trial is to withhold "matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined," the Georgia Supreme Court held that notice of statutory aggravating circumstances is not necessary for matters heard on the question of guilt or innocence. Eberheart v. State, 232 Ga. 247, 253, 206 S.E.2d 12 (1974); cf. Ford v. State, 232 Ga. 511, 512-13 (1), _____ S.E.2d _____ (1974). Thus, even without deciding whether a notice of any conventional, aggravating circumstance is required in a guilty plea case, the Georgia Supreme Court simply took the next logical step on the basis of these cases in petitioner's case and held that that notice was not required when the trial court was simply informing itself of the circumstances of the case.

The construction given a state statute by the highest court of the state is, of course, authoritative. Wainwright v. Stone, 414 U.S. 21 (1973); Elmendorf v. Taylor, 23 U.S. 152, 159-160 (1825). Petitioner, however, would qualify this proposition with his contention that he was entitled to take "the legislature at its word." Brief for Petitioner, 25, citing Wardius v. Oregon, 412 U.S. 470, 478 (1973). However, while an attorney examining Section 27-2534 might argue the position urged here by petitioner, his position is not so obviously correct as he puts it, and it was not "unforeseeable" to an attorney studying the statutory framework that the Georgia Supreme Court would find the notice requirement inapplicable to statutory aggravating circumstances, at least where they concern the events of the crime itself. See Bouie v. City of Columbia, 378 U.S. 347, 351-352 (1964).

The fact that petitioner's two co-defendants preceded him to jury trials, and the transcript of petitioner's guilty plea hearing, attached to his petition, refute his contention of

prejudice. The court unequivocally told petitioner that his guilty plea could result in a death sentence. Petitioner's Exhibit 1b, 2b. The court made it clear that its recess was for the purpose of taking further evidence. Petitioner's Exhibit 2b. Yet the record is devoid of a request for a continuance or even an objection to the State's evidence. Nor does the transcript of the hearing reflect surprise or objection to the sentence of death announced by the court. The first objection came by way of motions to vacate the judgment and grant a new trial. If petitioner's attorney was indeed so unfamiliar with the evidence of the State on the question of guilt or innocence, so that his cross-examination of witnesses was hampered, then this is a serious contention going to the validity of the guilty plea itself and requiring factual development which cannot be handled expeditiously in any other way than by writ of habeas corpus.

CONCLUSION

The Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by petitioner Hooks.

Respectfully submitted,

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